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Remarks of

WARREN E. BURGER
CHIEF JUSTICE OF THE UNITED STATES

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ISN'T THERE A BETTER WAY?

The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about.

The law is a tool, not an end in itself. Like any tool, our judicial mechanisms, procedures, or rules can become obsolete. Just as the carpenter's handsaw was replaced by the power saw, and his hammer was replaced by the stapler, we should be alert to the need for better tools to serve the ends of justice.

Many thoughtful people, within and outside our profession, question whether that is being done today. They ask whether our profession is fulfilling its historical and traditional obligation of being healers of human conflicts and whether we are alert in searching for better tools. Although it may be too much to say that we lawyers are becoming part of the problem instead of the means to a solution, I confess there is more to support our critics than I would have thought 15 or 20 years ago.

Litigation and the Adversary Tradition

Today, I address the administration of justice in civil matters, which shares with criminal justice both delay and lack of finality. Even when an acceptable result is finally achieved in a civil case, that result is often drained of much of its value because of the time-lapse, the expense and the emotional stress inescapable in the litigation process.

Abraham Lincoln once said: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time." In the same vein, Judge Learned Hand commented: "I must say that, as a

litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death."

I was trained, as many of you were, with that generation of lawyers taught that the best service a lawyer could render a client was to keep away from the courts. Obviously that generalization needs qualifying, for often the courts are the only avenue to justice. In our search for "better ways," we must never forget that.

Law schools have traditionally steeped the students in the adversary tradition rather than in other skills of resolving conflicts. And various factors in the past 20-25 years—indeed increasingly—have combined to depict today's lawyer in the role of a knight in shining armor, whose courtroom lance strikes down all obstacles. But the emphasis on that role can be carried too far. Only very few law schools have significant focus on arbitration. Even fewer law schools focus on training in the skills—the arts—of negotiation that can lead to settlements. Of all the skills needed for the practicing lawyer, skill in negotiation must rank very high.

It is refreshing to note that the Dean of a new law school recently said he hoped the school would play a leading role in preparing lawyers to find fresh approaches to resolving cases outside the courtroom. He said:

> The idea of training a lawyer as a vigorous adversary to function in the courtroom is anachronistic. With court congestion and excessive litigiousness drawing increasing criticism, it is clear that lawyers in the future will have to be trained to explore nonjudicial routes to resolving disputes.[1]

This echoed the theme of the 1976 Pound Conference of which this Association was a cosponsor. Obviously two of those "non-judicial routes" are arbitration and negotiation, and it is very encouraging to find a new law school opening with this fresh approach. A third approach is greater use of the techniques of the administrative process exemplified by the traditional workmen's compensation acts. The adver-

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[1]Dean Charles Halpern, Law School, City University of New York.

sary process is expensive. It is time-consuming. It often leaves a trail of stress and frustration.

One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.

Possibly the increased litigiousness that court dockets reflect simply mirrors what is happening worldwide. The press, TV and radio, for hours every day, tell us of dire events in Asia, Africa, Europe and Latin America where there is seething political, social and economic turmoil. It is not surprising that our anxieties are aggravated and we have a few problems of our own.

In 1975, Professor John Barton of Stanford cautioned that:

> As implausible as it may appear, . . . increases over the last decade suggest that by the early 21st century—18 years hence—the federal appellate courts alone will decide approximately 1 million cases each year. That bench would include over 5,000 active judges.

We do not need to accept this scholar's perception to know that the future prospects are neither comfortable nor comforting.

Costs of Litigation

Our litigation explosion during this generation is suggested by a few figures: from 1940 to 1981, annual Federal District Court civil case filings increased from about 35,000 to 180,000. This almost doubled the yearly case load per judgeship from 190 to 350 cases. The real meaning of these figures emerges when we see that federal civil cases increased almost six times as fast as our population.

From 1950 to 1981, annual Court of Appeals filings climbed from about 2,800 to more than 26,000. The annual case load

per Circuit judgeship increased from 44 to 200 cases. That growth was 16 times as much as the increase in population. A similar trend took place in the state courts from 1967 to 1976, where appellate filings increased eight times as fast as the population, and state trial court filings increased at double the rate of population growth.

We see more and more that people tend to be less satisfied with one round of litigation and are demanding a "second bite at the apple," far more than in earlier times.

It bears repeating—and we, as lawyers, know that litigation is not only stressful and frustrating, but expensive and frequently unrewarding for litigants. A personal injury case, for example, diverts the claimant and entire families from their normal pursuits. Physicians increasingly take note of "litigation neuroses" in otherwise normal, well-adjusted people. This negative impact is not confined to litigants and lawyers. Lay and professional witnesses, chiefly the doctors who testify, are also adversely affected. The plaintive cry of many frustrated litigants echoes what Learned Hand implied: "There must be a better way."

A common thread pervades all courtroom contests: lawyers are natural competitors and once litigation begins they strive mightily to win using every tactic available. Business executives are also competitors and when they are in litigation they often transfer their normal productive and constructive drives into the adversary contest. Commercial litigation takes business executives and their staffs away from the creative paths of development and production and often inflicts more wear and tear on them than the most difficult business problems.

We read in the news of cases that continue not weeks or months, but years. Can it be that the authors of our judicial system, those who wrote constitutions 200 years ago, ever contemplated cases that monopolize one judge for many months or even years? A case recently terminated has been in court 13 years, and has largely occupied the time of one judge for half that time, with total costs running into hundreds of millions of dollars.

I doubt the Founding Fathers anticipated such results. That these cases are infrequent is not the whole story. In 1960, there were only 35 federal trials that took more than one month. By 1981, these protracted cases multiplied five times, and that is not the end of the story. All litigants standing in line behind a single protracted case—whether it is a one-month, a three-month or a longer case—are denied access to that court. This becomes more acute if that litigant cannot recover interest on the award, or is allowed interest at 8 percent while paying double or more on a home mortgage or other debts.

Modern Application of Arbitration

We must now use the inventiveness, the ingenuity and the resourcefulness, that have long characterized the American business and legal community, to shape new tools. The paradox is that we already have some very good tools and techniques ready and waiting for imaginative lawyers to adapt them to current needs. We need to consider moving some cases from the adversary system to administrative processes, like workmen's compensation, or to mediation, conciliation, and especially arbitration. Divorce, child custody, adoptions, personal injury, landlord and tenant cases, and probate of estates are prime candidates for some form of administrative or arbitration processes.

Against this background I focus today on arbitration, not as the answer or cure-all for the mushrooming case loads of the courts, but as one example of "a better way to do it."

If the courts are to retain public confidence, we cannot let disputes wait two, three, or five years to be disposed of, as is so often the situation. The use of voluntary private binding arbitration has been neglected. Lawyers in other countries, who admire the American system in general, are baffled that we use arbitration so little and use courts so much.

There is, of course, nothing new about the concept of arbitration to settle controversies. The concept of mediation and arbitration preceded by many centuries the creation of formal and organized judicial systems and codes of law. An-

cient societies, more than 25 centuries ago, developed informal mechanisms, very much like mediation and arbitration, to resolve disputes.

In the time of Homer, for example, the community elders served as civil arbitrators to settle disputes between private parties. By the fourth century B.C., this practice was a settled part of Athenian law. Commercial arbitration was a common practice among Phoenician traders and the desert caravans of Marco Polo's day, and later in the Hanseatic League.

An early use of arbitration in America was of Dutch origin. In 1647, in what is now New York City, an ordinance created the "Board of Nine," which arbitrated minor civil and mercantile disputes. In colonial Connecticut, Pennsylvania, Massachusetts, and South Carolina, various arbitration mechanisms were established to deal with debt or trespass and boundary disputes. As early as 1682, the Assembly of West New Jersey enacted a law which provided:

> And for the preventing of needless and frivolous Suits, Be it Hereby Enacted . . . that all Accounts of Debt . . . of Slander . . . and Accounts whatsoever not exceeding Twenty Shillings, . . . Arbitration of two [neutral] Persons of the Neighbourhood, shall be tendered by some one Justice of the Peace who shall have Power to summon the Parties . . .

Despite the early use of arbitration in this country, and despite legislative efforts to expand that process in this country, two strong adversaries emerged: first, some judges, fearing that arbitration would deprive them of their jurisdiction, jealously guarded their powers and resisted arbitration. Second, lawyers, mistakenly fearing that arbitration would adversely affect their practice, zealously pursued court litigation. Ironically, experience has shown that litigants can secure acceptable arbitration results and lawyers are not necessary to that process.

More than 50 years ago this Association had a large part in

drafting the U. S. Arbitration Act, which called for binding arbitration to cut delay and expense. Yet for all that early support of arbitration, it has not developed as an alternative to adversary litigation in the courts. Old attitudes and old habits die hard.

Recent Developments

It is often difficult to discern the precise time when new developments occur relating to the human condition, but I think that for at least the past 20 years there has been a slowly—all too slowly—developing awareness that the traditional litigation process has become too cumbersome, too expensive and also burdened by many other disadvantages.

In 1976 we took note of these growing problems in commemorating the 70th Anniversary of Roscoe Pound's indictment of the American judicial and legal systems. That Conference brought arbitration sharply into focus. In opening the Pound Conference, I urged that we make a "reappraisal of the values of the arbitration process. . . ." The Association responded promptly to the Pound Conference and there are now committees taking a fresh look at alternative means of dispute resolution. Our President, David Brink, has given the broad subject priority status.

What we must have, I submit, is a comprehensive review of the whole subject of alternatives, with special emphasis on arbitration. It is now clear that neither the federal nor the state court systems are capable of handling all the burdens placed upon them. Surely the avalanche that is bound to come will make matters worse for everyone.

I do not suggest in any sense that arbitration can displace the courts. Rather, arbitration should be an alternative that will complement the judicial systems. There will always be conflicts which cannot be settled except by the judicial process.

Let me suggest some of the important advantages in private arbitration, especially in large, complex commercial disputes:

—Parties can select the arbitrator, taking into account the special experience and knowledge of the arbitrator.

—A privately selected arbitrator can conduct all proceedings in a setting with less stress on the parties; confidentiality can be preserved where there is a valid need to protect trade secrets, for example.

—Arbitration can cope more effectively with complex business contracts, economic and accounting evidence, and financial statements. A skilled arbitrator acting as the trier, can digest evidence at his own time and pace without all the expensive panoply of the judicial process.[2]

—Parties to arbitration can readily stipulate to discovery processes in a way that can control, if not eliminate, abuses of discovery processes.

One example of an effective statutory, although not binding, arbitration program is found in Pennsylvania. The impact upon court backlogs in that state has been significant. In Philadelphia, in the first two years after the jurisdictional level was increased to $10,000, the entire civil calendar backlog was reduced from 48 months to 21 months. In 1974, more than 12,000 of approximately 16,000 civil cases were resolved through arbitration.

Several federal courts have experimented with similar procedures established under local rules that refer certain types of civil suites seeking damages, in some cases up to $100,000, to an arbitration panel of three attorneys. The results indicate that arbitration could well shorten the disposition of most cases by two to four months, and that the counsel in the cases hold a generally favorable view of the procedure. Perhaps most important, preliminary evidence suggests that arbitration may reduce by as much as half the number of such

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[2]To operate a U. S. District Court with a jury costs approximately $350.00 per hour.

cases that otherwise would go to trial.

We must, however, be cautious in setting up arbitration procedures to make sure they become a realistic alternative rather than an additional step in an already prolonged process. For this reason, if a system of voluntary arbitration is to be truly effective, it should be final and binding, without a provision for *de novo* trial or review. This principle was recognized centuries ago by Demosthenes, who, in quoting the law, told the people of Athens:

> [W]hen [the parties] have mutually selected an arbiter, let them stand fast by his decision and by no means carry on appeal from him to another tribunal; but let the arbiter's [decision] be supreme.

Anything less than final and binding arbitration should be accompanied by some sanctions to discourage further conflict. For example, if the claimant fails to increase the award by 15 percent or more over the original award, he should be charged with the costs of proceedings plus the opponent's attorney fees. Michigan is one of the states that has experimented with this kind of sanction and such programs deserve close study.

The ABA Programs

The Association has taken a positive step by broadening the jurisdiction of the "Special Committee on Resolution of Minor Disputes" and it is now designated the "Special Committee on Alternative Means of Dispute Resolution."

That was a good step, but with all deference, I suggest to you, Mr. President, and to the Association, we need more. Either the existing committee be altered or an enlarged commission be created. Such a commission could well include not only distinguished leaders of the Bar, but also distinguished representatives of business and other disciplines.

The Association should now proceed carefully with an in-depth examination of these problems. This cannot be done routinely or casually. Rather, it must be done on the scale of

the 1969 monumental work of the American Law Institute on the jurisdiction of the American courts. We should draw on the accumulated experience of such groups as the American Arbitration Association.

If there are objectors, as there may be, to broadening arbitration, objections will serve to sharpen the analysis of the alternatives and guide us in making arbitration effective.

For 200 years, our country has made progress unparalleled in human history. We have done this by virtue of a willingness to combine ancient wisdom with innovation and with what was long called "Yankee ingenuity."

The American Bar Association has been a leader in virtually every major improvement in the administration of justice in the past quarter of a century. During my tenure in office, alone, your support made possible the Institute for Court Management, the Circuit Executives for Federal Courts, the Code of Judicial Conduct, the National Center for State Courts, expanded continuing education for lawyers and judges and training of paralegals. All of these were aimed at delivering justice in the shortest possible time and at the least expense.

The proposal I submit to you today could well be another major contribution by this Association to make our system of justice work better for the American people.

One more thing, President Brink, I pledge you my full cooperation.